Supreme Court, U.S.
FILED

No. 10-993

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Supreme Court of the United States

JOHN C. SHARP,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, which have been judicially interpreted to provide the right for a defendant to testify on his own behalf, must a district court maintain an on-the-record waiver of that right?

List of All Parties to the Proceeding

The parties to this proceeding are all listed in the caption.

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Citations of the Official and Unofficial Opinions and Orders

The decision of the United States Court of Appeals for the Fourth Circuit in the proceedings below was docketed at the Court of Appeals as record no. 09-4932. The opinion was unpublished and is included in the appendix at App. 1.

Concise Statement of the Basis for Jurisdiction

Judgment was rendered by the United States Court of Appeals for the Fourth Circuit on November 5, 2010. There was no request for a rehearing.

This court has jurisdiction for consideration of a petition for certiorari pursuant to 28 U.S.C. § 1254(1).

The instant case constitutes a challenge to the constitutionality of the district court's failure to receive an on-the-record waiver of Dr. Sharp's constitutional right to testify on his own behalf.

Constitutional and Statutory Provisions at Issue

U.S. Const. Amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time

> of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law....

U.S. Const. Amend. VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. Amend. XIV, Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state

> deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

18 U.S.C. § 3481

> In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

W.Va. Const. art. 3, § 10

> No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers.

Statement of the Case

Dr. Sharp was deprived of his right at trial to testify on his own behalf as a result of his previous counsel failing to comply with the West Virginia Rules of Professional Conduct. See W.Va. R. Prof. Conduct 1.2(a). The trial court failed to obtain an on-the-record waiver.

This writ is from the unpublished opinion of the Fourth Circuit. An appeal was taken from a judgment of the United States District Court for the Northern District of West Virginia, the Honorable Irene M. Keeley, presiding. On July 20, 2007, a 30 count indictment was returned against Dr. Sharp alleging violations of 18 U.S.C. § 1347 and 18 U.S.C. § 2. A superseding indictment was returned on December 18, 2007 containing different allegations in counts 1, 2, 9, 10, 11, 16 and 20.

A jury returned a guilty verdict on all counts. Dr. Sharp filed a motion for a new trial to set aside the verdict. The motion was denied. The court imposed a sentence of 30 months of imprisonment, a restitution of $542,275.51 and an assessment in the amount of $2,900.00.

Statement of Facts

Dr. Sharp was a country doctor practicing in rural West Virginia. He is 71 years old. Over the course of his medical career, he has treated thousands of patients. He is one of the few remaining doctors who still made house calls. Dr. Sharp is one of the founders of the West Virginia Osteopathic Medical School located in Lewisburg, West Virginia. He has a quiet and humble personality.

Dr. Sharp was represented at trial by three lawyers, Dorwin Wolfe, Thomas Dawson and Joel Hirschhorn. Dorwin Wolfe is the only lawyer admitted to the bar in West Virginia. Thomas Dawson and Joel Hirschhorn applied and were

admitted *pro hac vice*. Conduct of all three lawyers is governed by the West Virginia Rules of Professional Conduct. Such rules specifically mandate a lawyer's duty of consulting with a client on the issue of whether the client will testify. All three lawyers testified at a post-trial hearing. Dorwin Wolfe and Thomas Dawson testified they did not consult with Dr. Sharp about testifying. Joel Hirschhorn had no specific recollection of such a consultation.

The night before trial, Joel Hirschhorn told Dr. Sharp to "go home and talk to Saint Peter." Dr. Sharp took this to mean he should prepare himself to testify. Defense counsel rested without consulting with Dr. Sharp. Subsequent to the defense resting, Dr. Sharp attempted to learn from his counsel why he was not permitted to testify, but he was never given an explanation.

During trial, no inquiry was made by the lower court with Dr. Sharp on the issue of his testifying. Dr. Sharp did not testify on his own behalf, despite his desire to do so.

Summary of the Argument

The constitutional right to testify on one's own behalf is so fundamental in nature, that an on-the-record waiver must be exercised so as to ensure the defendant's waiver of this right is made voluntarily, knowingly, and intelligently.

Argument

A. The right to testify on one's own behalf is a fundamental constitutional right.

This Court has previously made on-the-record waivers mandatory when fundamental rights are at issue. Any time a defendant enters a plea other than "not guilty," the court must engage in an on-the-record waiver of the right to jury trial. Boykin v. Alabama, 395 U.S. 238, 242 (1969). Similarly, the Court has held that an on-the-record waiver must occur when there is a waiver of the right to counsel. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). This Court's previous rulings require judges to maintain on-the-record discussions with defendants to ensure that the defendant understands her constitutional rights, and that the issues are properly preserved. This Court should similarly require on-the-record discussions with the defendant about the fundamental right to testify on one's own behalf. Silence by a defendant may not constitute a waiver of this fundamental right because the defendant may not know she has a constitutional right to testify.

The right to testify on one's own behalf is a "fundamental" right. Rock v. Arkansas, 483 U.S. 44, 53 n.10 (1987). See Nix v. Whiteside, 475 U.S. 157, 164 (1986); Jones v. Barnes, 463 U.S. 745, 751 (1983); Brooks v. Tennessee, 406 U.S. 605, 612 (1972); Harris v. New York, 401 U.S. 222, 225 (1971). However, this right was not always considered a constitutional right. A defendant was not permitted to take the witness stand in her own

defense until 18 U.S.C. § 3481 was passed. Before this statute, there was no uniform rule that allowed the defendant to be considered a competent witness. Ferguson v. State of Georgia, 365 U.S. 570, 577 (1961).

The right to testify on one's own behalf has been judicially interpreted as having roots in the Fifth, Sixth, and Fourteenth Amendments to the Constitution. This Court has held that the right to testify on one's behalf is "essential to due process of law in a fair adversary process." Rock at 51 (citing Faretta v. California, 422 U.S. 806, 819, n. 15 (1975)). The right to testify is also "found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call 'witnesses in his favor.'" Rock at 52. In fact, this Court held that "[t]here is no justification today for a rule that denies an accused the opportunity to offer his own testimony." Id. This Court has specifically found that "[a]t this point in the development of our adversary system, it cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense." Id. at 49.

B. Some states require an on the record inquiry by the trial court.

Currently, at least nine state courts (Alaska, Colorado, Hawaii, Minnesota, Mississippi, Pennsylvania, South Carolina, Washington, and West Virginia) require an on-the-record discussion with a defendant before the right to testify on one's own behalf may be waived. Alaska has a rule of

criminal procedure that requires that the court must inquire whether the defendant voluntarily waives her right to testify if defense counsel rests without the defendant testifying. See Alaska R. Crim. P. 27.1. At least eight other states find that it is not necessary, but it is advisable, for the judge to make an on-the-record inquiry (Arizona, Florida, Georgia, Idaho, Massachusetts, Nevada, Wisconsin, and Wyoming). In fact, the West Virginia Supreme Court mandates that a defendant in state court must be afforded an on-the-record colloquy about the right to testify:

> A trial court exercising appropriate judicial concern for the constitutional right to testify should seek to assure that a defendant's waiver is voluntary, knowing, and intelligent by advising the defendant outside the presence of the jury that he has a right to testify, that if he wants to testify then no one can prevent him from doing so, that if he testifies the prosecution will be allowed to cross-examine him. In connection with the privilege against self-incrimination, the defendant should also be advised that he has a right not to testify and that if he does not testify then the jury can be instructed about that right.

State v. Neuman, 371 S.E.2d 77, 82 (W.Va. 1988) (citing People v. Curtis, 681 P.2d 504, 514 (Colo. 1984)). There is a notable disparity in the law that if Dr. Sharp had been tried in a state court in the very

state where he was convicted in a federal court, then the trial court would have been required to have an on-the-record waiver of his right to testify.

The right to testify on one's own behalf is so fundamental in nature, that in some jurisdictions, an attorney must allow her client to testify, even if the attorney knows her client may lie. See Model R. Prof. Conduct 3.3, Comments 7 & 8 (ABA 2010). In that instance, if the attorney is unable to persuade the client not to testify, and is not permitted to withdraw representation, the attorney must allow her client to testify in a narrative manner. That attorney, of course, may not seek testimony from her client through questioning and may not refer to the client's testimony in her closing argument, or at any other time during the trial. Id.

C. Dr. Sharp was denied his fundamental constitutional right to testify on his own behalf.

In the instant case, Dr. Sharp wished to testify on his own behalf. Dr. Sharp's trial counsel did not inform their client that he has the absolute right to testify on his own behalf in violation of Rule 1.2 of the West Virginia Rules of Professional Conduct and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. The district court did not make any inquiry of Dr. Sharp about whether he wanted to testify on his own behalf. Dr. Sharp's counsel rested their case without consulting with Dr. Sharp. The court in Poe v. United States stated:

> the right to testify is a basic right, and there is an obligation on the part of both the Court and trial counsel to inform the accused of his right to testify if he so desires. Further, it is the duty of both to assure that the exercise of this basic right by the accused is a free and meaningful decision.

United States ex rel. Wilcox v. Johnson, 555 F.2d 115, 118-119 (3d Cir. 1977) (citing Poe v. United States, 233 F. Supp. 173, 176 (D.D.C. 1964)). In United States v. Butts, the court found that

> Counsel's actions in not permitting Defendant the opportunity to testify affected the very fairness of the trial process itself by resulting in the Defendant being deprived of the opportunity to testify.... a defendant's right to testify in a criminal proceeding against him so basic to a fair trial that its infraction can never be treated as harmless error...

630 F. Supp. 1145, 1148 (D. Me. 1986). The Fifth Circuit has held that the right to testify is "such an inherently personal fundamental right that it can be waived only by the defendant and not by his attorney." Winters v. Cook, 489 F.2d 174, 179 (5th Cir. 1974). See also United States v. Mullins, 315 F.3d 449, 454 (5th Cir. 2002); United States v. Manjarrez, 258 F.3d 618, 623 (7th Cir. 2001); United States v. Webber, 208 F.3d 545, 550-51 (6th Cir. 2000); United States v. Ortiz, 82 F.3d 1066, 1070

(D.C. Cir. 1996); United States v. McMeans, 927 F.2d 162, 163 (4th Cir. 1991); Boyd v. U.S., 586 A.2d 670 (D.C. 1991); United States v. Bernloehr, 833 F.2d 749, 751 (8th Cir. 1987). Dr. Sharp was not afforded any protection of his fundamental right to testify on his own behalf. Dr. Sharp's trial counsel did not inform him about this absolute right. The district court also did not inform Dr. Sharp about this fundamental constitutional right.

Silence alone by the defendant can never constitute a waiver of the right to testify. It is not enough to assume trial counsel has spoken with the defendant and explained this right. A defendant cannot make a knowing, intelligent, and voluntary waiver of the right to testify if the defendant is not first aware this right exists. The only way to ensure the defendant fully realizes and appreciates this right is by requiring an on-the-record discussion by the court. Only then, may the defendant knowingly and intelligently waive the fundamental right to testify on one's own behalf.

Adopting a requirement for trial courts to mandate on-the-record discussions will ensure the defendant's fundamental right to testify is protected and will provide for judicial economy at the appellate and trial court levels.

Conclusion

WHEREFORE, the undersigned asks that the petition for certiorari to the United States Court of Appeals for the Fourth Circuit be granted.

Respectfully submitted,

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Appendix

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Unpublished Opinion and Judgment of
The United States Court of Appeals
For the Fourth Circuit
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Order of
The United States District Court for the Northern
District of West Virginia
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[ENTERED November 5, 2010]

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
No. 09-4932
JOHN C. SHARP,
Defendant-Appellant.

Argued September 22, 2010

Decided November 5, 2010

Before AGEE, Circuit Judge, HAMILTON, Senior Circuit Judge, and James C. DEVER III, United States District Judge for the Eastern District of North Carolina, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Paul Harris, Wheeling, West Virginia, for Appellant. Alan McGonigal, OFFICE OF THE UNITED STATES ATTORNEY, Wheeling, West Virginia, for Appellee.

ON BRIEF: Joseph M. Spivey, Lexington, Virginia; Joseph A. Wallace, Elkins, West Virginia, for Appellant. Betsy C. Jividen, Acting United States

Attorney, Charleston, West Virginia, Randolph J. Bernard, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Wheeling, West Virginia, for Appellee.

OPINION

PER CURIAM:

Dr. John C. Sharp ("Sharp") appeals his convictions upon twenty-nine counts of health care fraud, in violation of 18 U.S.C. § 1347. On appeal, Sharp alleges numerous errors, which this Court has construed[1] as including, but not limited to: that the district court abused its discretion by allowing certain statistical evidence at trial and by allowing testimony from a non-physician medical billing and

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[1] Recounting the issues on appeal has proven challenging, as the arguments are difficult to discern from Sharp's briefs. Sharp has also violated Federal Rule of Appellate Procedure 28(a)(9)(B) by failing to include an applicable standard of review for any of the issues he raises. However, we note that during oral argument counsel conceded that the Government's proposed standards of review are accurate.

Although Sharp failed to satisfy the mandates of Rule 28, which in many instances may result in dismissal of the appeal, see, e.g., Harrelson v. Lewis, 418 F.2d 246, 247 (4th Cir. 1969), this Court has a "measure of discretion . . . whereunder it may consider an appellant's claim of error, even despite its inadequate assertion, especially when the pertinent record appears fully to be before the court, and the controverted questions have actually been argued." Indemnity Ins. Co. of N. Am. v. Pioneer Value Sav. Bank, 343 F.2d 634, 643 (8th Cir. 1965). We exercise that discretion in this case with the admonition to Sharp's counsel that they should take greater care in future appeals.

coding expert, that Sharp was deprived of his right to testify on his own behalf, prosecutorial misconduct, that certain counts in the indictment were time-barred, and that § 1347 was inapplicable. For the following reasons, we affirm the district court's judgment.

I.

Sharp was a doctor of osteopathic medicine and licensed to practice in the state of West Virginia. He operated a general family practice medical clinic under the name Pocahontas Medical Clinics ("PMC").

Sharp was enrolled as a provider with Medicare, Medicaid, and the West Virginia Workers' Compensation Program ("WVWC"). These third party payers pay claims using a national billing coding practice based on the Physicians' Current Procedural Terminology ("CPT") system, which is published in the AMA Current Procedural Terminology Manual ("CPT Manual"). The CPT Manual provides codes for each of the services provided to the program's beneficiaries by the provider, with descriptions of each. The codes are meant to account for the length of the doctor's visit with the patient, the complexity involved in the medical decision making, and the patient's medical history.

Each of the counts against Sharp charged that he knowingly and fraudulently misused the billing codes. The charges represent three general schemes: (1) the fraudulent misuse of so-called "prolonged

services" codes, which are codes that are used for a visit that requires face-to-face time with the patient that is longer than the typical time spent rendering that type of procedure or service; (2) "upcoding," or submitting claims for a "higher" level service than the one actually rendered; and (3) billing for services not rendered.

During trial, the Government called two expert witnesses whose testimonies are relevant to this appeal. The first was Betty Stump ("Stump"), a medical coding and billing expert. In sum, Stump testified that she reviewed the office visit progress notes maintained by Sharp and determined that Sharp's billings were not supported by the documentation. The Government also called Dr. Klaus Miescke ("Miescke"), a statistician. Because Sharp submitted over 15,000 claims to the third party payers during the relevant time period, the Government asked Miescke to "select a statistically valid random sample" of the claims to determine the estimated total amount of loss to Medicare and Medicaid. (Appellee's Br. 11).

At the conclusion of trial, the jury returned a verdict convicting Sharp on all counts, and he was sentenced to 36 months' imprisonment.

Sharp moved for a new trial, or in the alternative, for a judgment of acquittal, alleging multiple errors which included ineffective assistance of counsel, that certain counts of the superseding indictment were time-barred, prosecutorial misconduct, that 18 U.S.C. § 1347 was inapplicable to worker's compensation programs, that the district

court erred by allowing Miescke's and Stump's testimonies, insufficiency of the evidence, that the district court erred by not including a proposed jury instruction, and challenges to several trial rulings. After holding a post-trial hearing, the district court denied Sharp's motion in a written order.

Sharp noted a timely appeal, and this Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

II.

A.

Sharp argues that the district court erred by allowing certain expert testimony at trial; namely, that Miescke's use of statistical extrapolation to estimate loss was allowed in error, and that Stump's testimony was allowed in error because she is not a physician.[2]

This Court reviews a district court's evidentiary rulings, including rulings on the admissibility of expert testimony, for abuse of discretion. Gen. Elec. Co. v. Joiner, 522 U.S. 136,

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[2] In his brief, Sharp originally frames these issues as alleging that the "Government failed to meet its burden by not providing expert testimony from a physician," (Appellant's Br. 1), and that "[i]ntroduction of evidence contained in paragraphs 10, 11 and 12 of the Superseding Indictment were unduly prejudicial because statistical evidence is not appropriate at trial." (Appellant's Br. 2). We have reframed the issues in an attempt to make sense of Sharp's convoluted opening brief while endeavoring to sufficiently address the substance of his claims.

141-42 (1997). "The question of whether expert testimony is admissible is within the sound discretion of the trial judge, and appellate courts normally defer to the trial judge's decision." Persinger v. Norfolk & W. Ry. Co., 920 F.2d 1185, 1187 (4th Cir. 1990).

1.

Before trial, Sharp moved to exclude Miescke's testimony, arguing during a pre-trial Daubert hearing that "it is inappropriate at the count phase for there to be extrapolation testimony that goes to the amount of the loss. . . . [T]hat is a sentencing issue, if we ever get there . . . ." (J.A. 422). The district court considered the issue and decided to allow the testimony.

Sharp raised the issue again in his motion for a new trial or for acquittal. The district court held that, "[a]fter weighing the parties' arguments, [the district court] has no trouble concluding that Dr. Miescke's statistical testimony was properly admitted, . . . and survives the defendant's challenge under Federal Rule of Evidence 403 because its probative value substantially outweighed any unfair prejudice to the defendant." (J.A. 323).

Although Miescke's statistical evidence would also have been appropriate during the sentencing phase of the trial, we find that the district court did not abuse its discretion by allowing the testimony during trial. See United States v. Rosin, 263 Fed. Appx. 16, 21 (11th Cir. 2008) (unpublished) (mentioning the use of similar testimony during

trial). First, we note that Miescke "provide[d] a valid foundation" for his conclusions by explaining how he reviewed the claims, the statistical methods he used, and how he arrived at his proposed estimate of loss. Cooper v. Smith & Nephew, Inc., 259 F.3d 194, 200 (4th Cir. 2001); see Fed. R. Evid. 702. Indeed, Sharp does not contest Miescke validly qualified as an expert witness nor does Sharp contend Miescke applied statistically invalid methods.[3]

Furthermore, Miescke's testimony was relevant pursuant to Federal Rule of Evidence 402; it gave the jury context as to the extent of the alleged loss, and conducting testimony as to approximately 15,000 claims of fraud would have been overly burdensome. Nor was the testimony improperly prejudicial pursuant to Federal Rule of Evidence 403, particularly considering that there was overwhelming evidence of guilt as to each count. More importantly, Miescke never opined as to Sharp's actual guilt or the existence of fraud. See United States v. Sdoulam, 398 F.3d 981, 990 (8th Cir. 2005) ("[The expert statistician] made no statement regarding the mathematical probability that [the defendant] was guilty of the crimes charged.").

Moreover, we can analogize Miescke's testimony to the methods used to determine total drug amounts in drug trafficking cases, which, while

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[3] In fact, during the Daubert hearing defense counsel agreed that "[w]e don't have a problem conducting the cross-examination at this stage with the statistician coming forward and saying this is what I did; this is how I arrived at this random sample. . . ." (J.A. 423).

often conducted during the sentencing phase, have at times been testified to during trial. See, e.g., United States v. Tran, 519 F.3d 98, 106 (2d Cir. 2008); Sdoulam, 398 F.3d at 989-90; United States v. Royal, 87 Fed. Appx. 892, 894 (4th Cir. 2004) (unpublished); United States v. Maceo,873 F.2d 1, 6-7 (1st Cir. 1989).

Finally, defense counsel had the opportunity to cross-examine Miescke and thus was able to challenge Miescke's method of analysis or his conclusions. Ultimately, it is the role of the jury to arrive at its own conclusions as to the credibility of the experts and the weight to give their testimony. See Maceo, 873 F.2d at 7 ("It is the jury's role to determine the credibility of witnesses and the weight to accord their testimony. After full cross-examination, the jury had the choice whether to trust the testimony presented."). On balance, the district court's ruling was thus an appropriate exercise of its discretion.

2.

Sharp also moved to exclude Stump's proposed testimony, arguing during the Daubert hearing that, although "[s]he can make a judgment as to whether or not the documentation supports" the code used, (J.A. 508), "she cannot render an opinion as to whether or not a particular medical decision should have been labeled low, moderate, high in terms of complexity . . . . Only a physician can determine that." (J.A. 506). The district court denied the motion, finding that

> a coding expert, such as Ms. Stump, routinely determines whether services billed by a provider are appropriately coded and if a provider documents a certain level of medical decision making, then the documentation is factored into the coding and billing decisions and I don't believe that this testimony will confuse the jury. I think it will be helpful to the jury.

(J.A. 510).

Sharp raised the issue a second time in his motion for a new trial or for acquittal. In the district court's order denying the motion, the court found that

> [t]he issues in this case did not involve questions of medical necessity, but rather alleged that Dr. Sharp had submitted claims for payment for services he had never rendered, or had sought reimbursement for higher levels of service than he had actually provided. In similar health care fraud cases, coding experts have routinely testified about whether services a provider billed were appropriate. . . .
>
> Because this case did not raise issues of medical necessity or any other clinical issue requiring a physician's testimony, and because the use of a coding expert was appropriate, . . . the

> Court rejects Sharp's contention that the government was required to provide expert physician testimony to prove health care fraud . . . .

(J.A. 325-26).

On appeal, Sharp reiterates this argument. In support, Sharp cites several cases from other courts of appeals which he contends stand for the proposition that physician testimony is necessary to prove coding or billing fraud, including United States v. Wexler, 522 F.3d 194 (2d Cir. 2008), United States v. Bek, 493 F.3d 790 (7th Cir. 2007), and others. However, these cases are clearly distinguishable from the case at bar.

The Second Circuit held in Wexler, a distribution of controlled substances and health care fraud case, that the expert testimony of a physician expert "regarding the standard of care . . . was properly received by the District Court as relevant to the question of Wexler's good faith in prescribing the controlled substances that were the subject of the indictment." Wexler, 522 F.3d at 204 (emphasis added). In Bek, another case dealing with the distribution of controlled substances and health care fraud, the Seventh Circuit held that the jury could not assess whether Bek's treatment of a patient was "within the normal course of professional practice" without medical records or expert testimony as to the patient's "condition or Bek's treatment of her." 493 F.3d at 799 (internal quotations omitted).

However, in the case at bar neither clinical decision making nor appropriate standards of care were at issue. Instead, the question was whether Sharp knowingly used incorrect codes for the services he claimed he provided. As Stump testified,

> as a coder or an auditor I'm not making any decisions about the treatment plan for the patient; I'm just looking to see what did the doctor document; what did he write down that the patient's problem is; what did he write down that his treatment plan is going to be. What did he write down about when he wants to see the patient back. What did he write down about possible risks to the patient. I don't question what the medical plan was; I simply evaluate it to determine where it falls in the scope of severity for assigning a code.

(J.A. 1163). Medical billing and coding experts have been used for this purpose without dispute in the Fourth Circuit. See, e.g., United States v. Janati, 374 F.3d 263, 271-72 (4th Cir. 2004) (noting that medical coding experts are used "to determine whether . . . documentation supports . . . billings under [the] CPT").

Finally, we observe that during cross-examination defense counsel questioned Stump about her status as a "coder" who is "not [a] clinician [ ] [and that] determinations regarding the propriety of medical decision making or a patient's clinical severity are omitted from the coding process." (J.A.

1625). Stump concurred that she does "not make clinical decisions" and agreed with defense counsel's statement that she is "not [a] clinician[ ]." (J.A. 1626). Thus, the argument Sharp makes here was before the jury and the jury properly performed its duty to "weigh the evidence and the credibility of each expert." Mosser v. Fruehauf Corp.,940 F.2d 77, 83 (4th Cir. 1991) (internal quotations omitted).

Consequently, as the district court appropriately found, "all the cases Sharp cites to support his argument that the government must present physician expert testimony involved disputed questions of `medical necessity.' By their nature, these are clinical cases which, unlike the instant case, do require the testimony of an expert health care provider." (J.A. 326). Thus, the district court did not abuse its discretion in permitting Stump's testimony.

B.

Sharp next alleges that he was deprived of his right to testify on his own behalf, either as a result of ineffective assistance on the part of his counsel, or due to the district court's failure to sua sponte conduct an on-the-record colloquy with Sharp to obtain a waiver of his right to testify.

At a post-trial hearing, Sharp testified that he had planned to take the stand during trial, and that none of his lawyers "s[a]t down with [him] and [went] through an analysis .. . [of] the risk of . . . testifying, the benefit of testifying, risk of not testifying, benefit of not testifying." (J.A. 3700).

Although Joel Hirschhorn ("Hirschhorn"), lead trial counsel for Sharp, admitted that he was not sure whether he said the "magic words," he was sure that he had discussions with Sharp about whether he would testify, and that Sharp "concurred in [his] decision." (J.A. 3815).

The district court found that "I don't have a circumstance here where I believe I had to get an on-the-record waiver of the right to testify because I didn't have any language or conduct from Dr. Sharp that would indicate that he was desirous to testify and that desire was being contravened by his attorneys." (J.A. 3864). The district court also found:

> I don't think that it's credible to believe that Dr. Sharp was unaware of his lawyers' strategic opinion about the wisdom of him taking the stand.
>
> . . . .
>
> [I]t is difficult, if not impossible, for this Court to believe that a man of Dr. Sharp's experience and intellect would not have questioned why no one was preparing him for testimony the next day.
>
> . . . .
>
> Dr. Sharp had an ample opportunity between the close of the evidence . . . [and] closing arguments . . . to tell [his attorneys] that he felt he'd been denied what he had expected, which was the right to testify.

. . . .

> So, on balance, when I weigh this evidence, there is a complete lack of support from the totality of that evidence for Dr. Sharp's recollection as to how this was handled.

(J.A. 3866-71).

In its order denying Sharp's motion for a new trial or for acquittal, the district court adopted these previous findings, and further found that "there was no agreement between Sharp's trial counsel and the government to deprive Sharp of his right to testify." (J.A. 310).

This Court reviews legal issues de novo and factual findings under a clear error standard. United States v. Pettiford, 612 F.3d 270, 275 (4th Cir. 2010).

1.

This Court construes Sharp's allegation that his trial counsel "violated West Virginia Rules of Professional Conduct" as an attempt to make an ineffective assistance of counsel argument. See Sexton v. French, 163 F.3d 874, 881 (4th Cir. 1998). However, "[t]he rule in this circuit is that a claim of ineffective assistance should be raised in a 28 U.S.C. § 2255 motion in the district court rather than on direct appeal, unless the record conclusively shows ineffective assistance." United States v. Williams, 977 F.2d 866, 871 (4th Cir. 1992). Because we find that it does not conclusively appear from the

record that Sharp's counsel was constitutionally ineffective, this Court will not consider Sharp's ineffective assistance of counsel claim.

However, even assuming arguendo that we could consider this claim on appeal, this Court finds that the district court did not clearly err in making the well-reasoned and detailed finding that it was "not credible" that Sharp was "unaware" of his right to testify on his own behalf or of the strategic decision not to testify, and that there was a "complete lack of support from the totality of that evidence for Dr. Sharp's recollection as to how this was handled." (J.A. 3870).

2.

Sharp also urges this Court to adopt "a rule that in cases such as the one at bar, the trial court itself is required to engage in an on-the-record colloquy with defendants when they elect to rest their case without testifying," (Appellant's Br. 13), and to find that the district court failed in this new duty.

Although, of course, the right to testify on one's own behalf "is one of the rights that are essential to due process of law in a fair adversary process,'" Rock v. Arkansas, 483 U.S. 44, 51 (1987) (quoting Faretta v. California, 422 U.S. 806, 819 n. 15 (1975)), this Court and the majority of our sister circuits have clearly held that "[t]o waive the right [to testify], all the defendant needs to know is that a right to testify exists," and the district court need not advise the defendant of the right nor obtain a

waiver. United States v. McMeans, 927 F.2d 162, 163 (4th Cir. 1991); see also United States v. Richardson, 195 F.3d 192, 197-98 (4th Cir. 1999); United States v. Ortiz, 82 F.3d 1066, 1070-71 (D.C. Cir. 1996);United States v. Pennycooke, 65 F.3d 9, 11-12 (3d Cir. 1995) (holding that a "direct colloquy" may be required in "exceptional, narrowly defined circumstances"); United States v. Brimberry, 961 F.2d 1286, 1289-90 (7th Cir. 1992); Siciliano v. Vose, 834 F.2d 29, 30 (1st Cir. 1987).

The holding in McMeans has not been overruled, altered, or limited by the subsequent holding in Sexton, contrary to Sharp's suggestion. In considering the question of "who should bear the burden of ensuring that the defendant is informed of the nature and existence of the right to testify," the Sexton Court noted that the McMeans Court's holding on this point was "perhaps unwise[]." 163 F.3d at 881. Nevertheless, the Sexton Court held that "trial counsel, not the court, has the primary responsibility for advising the defendant of his right to testify," and thus "the burden of ensuring that a criminal defendant is informed of the nature and existence of the right to testify rests upon trial counsel." Id. at 882.[4]

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[4] We note that Sharp specifically admitted at the post-trial hearing that he did know of his right to testify during the trial:

> Q: Now you said that it was your understanding throughout the whole trial, from beginning to end, that you would eventually testify, is that right?
> A: That's correct, yes sir.

Therefore, because the holdings of McMean and Sexton are unequivocal on this issue, the question of whether this Court should adopt Sharp's proposed "new rule" is foreclosed and cannot be overruled by this panel. See Mentavlos v. Anderson, 249 F.3d 301, 312 n.4 (4th Cir. 2001).

C.

Sharp next makes three allegations of prosecutorial misconduct; first, that the Government elicited "false testimony" from a witness, Lois Workman ("Workman"), by instructing her to only answer questions using the responses "yes" or "no;" second, that the Government improperly misstated the evidence;[5] and third, that the Government improperly exceeded the appropriate scope during its rebuttal argument by mentioning certain "altered records."

> Q: Okay. Why did you think that?
> A: I just knew that's a fact, that I would testify in my defense. There was never any question about it.

(J.A. 3712).

[5] Although Sharp makes the bare allegation that the Government "misstated the evidence," he makes no substantive argument in his brief supporting this proposition. Sharp has again run afoul of Federal Rule of Appellate Procedure 28, which "requires that the argument section of an appellant's opening brief must contain the appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." Wahi v. Charleston Area Med. Ctr., Inc., 562 F.3d 599, 607 (4th Cir. 2009) (internal quotations omitted). Thus, this Court will not consider Sharp's argument that the prosecutor "misstated the evidence."

In its order denying Sharp's motion for a new trial or for acquittal, the district court found that Workman

> did not answer only "yes" or "no" to questions asked of her, but provided detailed answers throughout her testimony. Moreover, . . . the portions of Workman's testimony characterized in her affidavit as "not accurate" were not material to the charges against Sharp. Accordingly, the evidence adduced at trial and otherwise found in the record does not support Sharp's allegation that the government presented false testimony during his trial.

(J.A. 316).

As to the allegation that the Government exceeded the allowable scope during its rebuttal argument, the district court found that

> the complained-of reference to altered records by the government came in response to the closing argument of Sharp's attorney referencing a memo by John Mitchell, Sharp's office manager. . . . In addition, he had argued that fraudulent claims arose due to John Mitchell's advice or innocent mistakes, and that Sharp's honest and law-abiding nature demonstrated that he had not knowingly hidden anything.

> Even if the government's statements in response to this argument could be considered improper, they did not unfairly prejudice Sharp's substantive rights; nor do they amount to reversible error.

(J.A. 317-19).

This Court reviews the denial of a motion for a new trial for an abuse of discretion. United States v. Adam, 70 F.3d 776, 779 (4th Cir. 1995).

The test for prosecutorial misconduct has two components: "(1) the prosecutor's remarks or conduct must in fact have been improper, and (2) such remarks or conduct must have prejudicially affected the defendant's substantial rights so as to deprive the defendant of a fair trial." United States v. Chorman, 910 F.2d 102, 113 (4th Cir. 1990) (internal quotations omitted).

1.

Although he fails to cite it in his brief, Sharp submitted a post-trial affidavit from Workman in which she swore that a few portions of her testimony were inaccurate and that she was "told by representatives of the Government that [she] was to answer the questions with a `yes' or `no.'" (J.A. 289). We assume this is Sharp's support for his charge the Government presented false testimony. However, even the most cursory review of Workman's testimony proves the contrary. During cross-examination, the Government asked questions of

Workman that required more than a "yes" or "no" response. Consequently, many of Workman's responses were more detailed and lengthy than merely "yes" or "no."

Furthermore, even if Workman were so instructed, Sharp provides no legal authority to support his argument that requesting a witness to answer only "yes" or "no" has ever been construed by any court as improperly eliciting false testimony. Thus, there is simply no support for Sharp's brazen accusation that the Government acted improperly in questioning Workman.[6]

2.

Sharp also fails to cite to any legal authority that supports his proposition that it constitutes reversible error for the Government's rebuttal argument to reach matters beyond the scope of the defendant's reply argument.

However, even if such a rule exists, the Government's reference to altered records was in direct reply to a theory raised by the defense during closing argument and throughout the trial; namely, the argument that any discrepancies in Sharp's

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[6] We note that Sharp makes a serious charge against the Government when he states in his brief that "the government knowingly presented false testimony during trial." However, Sharp does so without citation to the record, citation to authority, and without explanatory argument. In doing so, Sharp walks close to a line of ethical breach. We strongly caution counsel that such argument will be dealt with severely should it occur again. See Federal Rule of Appellate Procedure 46(c).

records or billing were caused by "human error mistakes, typographical errors, data entry, sloppy work, careless work" on the part of Sharp's office manager, John Mitchell ("Mitchell"), or others. (J.A. 3626). During closing, the defense specifically mentioned the so-called "Mitchell memo" which it alleged proved that Mitchell encouraged employees to alter records. The Government properly responded to the defense's theory, arguing that Sharp was actually the one altering the records because he had the most "to lose or gain." (J.A. 3665).

Consequently, this Court finds that there is no evidence that the Government engaged in any prosecutorial misconduct in this case.

D.

Sharp next contends that, because the superseding indictment was brought after the statute of limitations expired, and because there were "significant variances" between the original indictment and the superseding indictment, certain counts in the superseding indictment are time-barred.

In its order denying Sharp's motion for a new trial, the district court held that, "because Sharp did not raise the affirmative defense of the statute of limitations at trial, he has waived that defense." (J.A. 315). Alternatively, the district court held that "there is no basis to conclude that the Superseding Indictment broadened the charges in the original Indictment such that the charges in the Superseding Indictment are barred . . . ." (J.A. 315).

We need not determine whether the changes in the superseding indictment materially altered certain counts so that they did not relate back to the date of the original indictment. As the district court correctly found, because Sharp did not raise a statute of limitations defense before or during trial, he has consequently waived that defense. See United States v. Williams, 684 F.2d 296, 299 (4th Cir. 1982) ("The statute of limitations . . . is not jurisdictional. It is an affirmative defense that may be waived.").

E.

Sharp also argues that 18 U.S.C. § 1347 does not apply to state-owned and —operated workers' compensation systems, such as WVWC, because the statute "does not specifically state that it applies to state sponsored worker's compensation programs nor does the legislative history mention it." (Appellant's Br. 24).

The district court found that "Sharp cites no case law nor any portion of the relevant legislative history in support of his argument," and "state workers' compensation programs clearly fall under the express provisions of 18 U.S.C. § 1347." (J.A. 320-21).

This Court reviews issues of statutory construction de novo. United States v. Linney, 134 F.3d 274, 282 (4th Cir. 1998).

Sharp's argument is wholly without merit. The term "healthcare benefit program," as used in § 1347, is defined as

> [A]ny public or private plan or contract, affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item, or service for which payment may be made under the plan or contract.

18 U.S.C. § 24(b). Therefore, based on the clear language of the statute, WVWC plainly falls under the express definition of "healthcare benefit program." See, e.g., United States v. Lucien, 347 F.3d 45, 52 (2d Cir. 2003).

F.

As to Sharp's remaining claims, we have carefully reviewed all of these claims, the record, and the parties' arguments and find that the district court, for the reasons expressed in its well-reasoned order denying Sharp's motion for a new trial or for acquittal, properly denied relief.[7]

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[7] As to Sharp's claim that the district court erred during sentencing, we find that, because Sharp failed to order a transcript of the sentencing hearing, he has waived this issue on appeal. See Keller v. Prince George's County, 827 F.2d 952, 954 n.1 (4th Cir. 1987).

III.

For the foregoing reasons, the district court's judgments are affirmed.

AFFIRMED

[ENTERED: November 5, 2010]

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 09-4932 (2:07-cr-00019-IMK-JSK-1)

UNITED STATES OF AMERICA Plaintiff - Appellee v. JOHN C. SHARP Defendant - Appellant

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J U D G M E N T

In accordance with the decision of this Court, the judgment of the District Court is affirmed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

[ENTERED September 8, 2009]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA,

Plaintiff,

v. CRIMINAL NO. 2:07CR19

JOHN C. SHARP,

Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR A NEW TRIAL, OR IN THE ALTERNATIVE, MOTION FOR JUDGMENT OF ACQUITTAL

On February 13, 2009, the defendant, John C. Sharp ("Sharp"), filed timely posttrial motions in this case seeking a judgment of acquittal pursuant to Fed.R.Crim.P. 29(c), or in the alternative, a new trial pursuant to Fed.R.Crim.P. 33. (dkt. no. 172). On July 2, 2009, the Court held an evidentiary hearing to address Sharp's claims of prosecutorial misconduct and ineffective assistance of counsel. For the reasons stated on the record at that hearing, and for the reasons that follow, the Court **DENIES** Sharp's posttrial motions (dkt. no. 173).

I. Facts and Procedural History

On July 20, 2007, a grand jury indicted Sharp on the following: 1) ten (10) counts of defrauding health care benefits programs, namely Medicare, Medicaid and WVWC, by billing for prolonged services that were not rendered, in violations of 18 U.S.C. § 1347; 2) ten (10) counts of defrauding Medicare and Medicaid by upcoding the level of visit services actually rendered, in violation of 18 U.S.C. § 1347; and 3) ten (10) counts of defrauding Medicare and Medicaid by submitting claims for visit services which never occurred, in violation of 18 U.S.C. § 1347.[8]

During the trial, which lasted from May 27, 2008 through June 12, 2008, the government called a number of witnesses, including many of Sharp's former employees, as well as two expert witnesses. At the close of the government's case-in-chief, Sharp orally moved for a judgment of acquittal, which the Court denied (dkt. no. 121). Sharp then presented witnesses, including expert testimony. At the conclusion of the trial, a jury convicted Sharp on all counts.

Sharp now moves this Court for a new trial pursuant to Fed.R.Crim.P. 29(c), or a judgment of acquittal pursuant to Fed.R.Crim.P. 33 (dkt. no. 172).

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[8] On May 20, 2008, at the final pre-trial conference, the Court granted the government's motion to dismiss Count 17 (dkt. No. 104).

II. Statement of the Law

Rule 29(c) of the Federal Rules of Criminal Procedure provides that, on a defendant's motion, a court may set aside a jury verdict and enter a judgment of acquittal.

> When a defendant moves for a judgment of acquittal, the Court must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt.

U.S. v. Gallagher, 856 F. Supp. 295, 297 (E.D. Va. 1994) (quoting U.S. v. Mariani, 725 F.2d 862, 865 (2d Cir. 1984) (internal quotations omitted). When a court is considering a motion pursuant to Rule 29(c), it reviews the evidence in the light most favorable to the United States; thus, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, the court must sustain the conviction. U.S. v. Lowe, 65 F.3d 1137, 1142 (4th Cir. 1995). "Credibility determinations are within the sole province of the jury and are not susceptible to judicial review." Id.

A court may grant a motion for a new trial under Federal Rule of Criminal Procedure 33 "if the interest of justice so requires." "[A] court should exercise its discretion to grant a new trial sparingly," and should only do so "when the evidence weighs heavily against the verdict." U.S. v. Perry, 335 F.3d 316, 320 (4th Cir. 2003) (quoting *U.S.* v. Wilson, 118

F.3d 228, 237 (4th Cir. 1997) (internal quotations omitted). Unlike a motion for a judgment of acquittal, however, the Court is not constrained to view the evidence in the light most favorable to the government and may evaluate the credibility of the witnesses. U.S. v. Arrington, 757 F.2d 1484, 1485 (4th Cir. 1985). Thus, a new trial is appropriate "[w]hen the evidence weighs so heavily against the verdict that it would be unjust to enter judgment...." Id.

III. Analysis

A. Ineffective Assistance of Counsel

The Court took up Sharp's allegation of ineffective assistance of counsel during the evidentiary hearing on July 2, 2009, when it heard testimony from witnesses presented by both Sharp and the government, including Sharp's former trial counsel and Sharp himself. For the reasons stated on the record at the hearing, the Court found that Sharp knew he had a right to testify at trial, and further found that his actions at trial and immediately afterwards established a sufficient basis from which to infer that he had knowingly waived his right to testify. See United States v. McMeans, 927 F.2d 162, 163 (4th Cir. 1991). Based on the totality of the evidence, the Court further found that there was no agreement between Sharp's trial counsel and the government to deprive Sharp of his right to testify, or that, under the Strickland standard, Sharp's trial attorneys had been ineffective in their representation. See Strickland v. Washington, 466 U.S. 668, 687-88

(1984). Accordingly, the Court denied Sharp's motion.

B. Statute of Limitation on Certain Counts

Sharp contends that Counts 1, 2, 9, 10, 11, 16 and 20 of the Superseding Indictment were time barred by the five (5) year statute of limitations contained in 18 U.S.C. § 3282(a) because various changes in the Superseding Indictment "constitute significant variances and alter the statute of limitations." The government, however, argues that the Superseding Indictment contains only minor modifications to the original Indictment, none of which have altered the charges against Sharp.

The bringing of an indictment tolls the statute of limitations as to the charges contained in the indictment and puts the defendant on timely notice that he will be called to account for the charged activities, and that he should prepare his defense. United States v. Grady, 544 F.2d 598, 601 (2nd Cir. 1976). Because the statute of limitations is tolled following the return of the original indictment, as long as a Superseding indictment does not broaden or substantially amend the original indictment, the statute of limitations remains tolled and the Superseding Indictment relates back to the filing of the original indictment. Id. at 601- 02.

"In determining whether a Superseding indictment broadens the charges in the original indictment, the touchstone is whether the original indictment provided notice of the charges such that the defendant can adequately prepare his or her defense." United States v. Brown, 580 F. Supp. 2d 518 (W.D. Va. 2008). Trivial or innocuous changes

will not bar the Superseding indictment from relating back to the date of the original indictment. United States v. Snowden, 770 F.2d 393, 398 (4th Cir. 1985) (citations omitted).

The grand jury returned the original Indictment in Sharp's case on July 20, 2007, and later returned a Superseding Indictment on December 18, 2007. Counts 1, 2, 9, 10, 11, 16, and 20 involved medical reimbursement claims submitted within the five years prior to the original Indictment's date, but they were outside the five years prior to the date of the Superseding Indictment.[9] Sharp argues that the Superseding Indictment included additions to certain paragraphs, as well as the inclusion of two new paragraphs, ¶ 36 of the Introduction and ¶ 6 of Counts 1-10, which, either individually or together constitute significant variances.

After reviewing the original Indictment as well as the Superseding Indictment, the Court concludes that both are based on the same set of facts, and that the changes and additions in the Superseding Indictment do not broaden the charges from those originally filed. Importantly, as the government has argued, the original Indictment charged Sharp individually and noted that he was the sole shareholder, officer and general manager of the corporation, Pocahontas Medical Clinics, Inc.

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[9] The following is a list of the counts and the respective date for which the claim was made: Count 1 – September 13, 2002; Count 2 – September 13, 2002; Count 9 – August 14, 2002; Count 10 – August 14, 2002; Count 11 – October 2, 2002; Count 16 – October 4, 2002; and Count 20 – September 25, 2002.

("PMC"). The changes in paragraph 2 of the Introduction merely state the date on which PMC was terminated and that, from that date forward, Sharp owned and operated PMC as a sole proprietorship. Similarly, the additions to paragraphs 9 and 14 of Counts 1-10, paragraphs 7 and 11 of Counts 11-20, and paragraphs 5 and 6 of Counts 21-28 indicate that Sharp, who was the sole proprietor of PMS, undertook the alleged actions instead of the corporation, PMC.

Those changes neither altered the facts laid out in the original indictment, nor broadened the charges, which remained against Sharp individually. Similarly, the additions to paragraph 5, the new paragraph 6 in Counts 1-10, and the alterations to paragraph 26 of the Introduction[10] are not consequential inasmuch as they do not broaden the charges in those sections of the original Indictment concerning the submission of fraudulent claims. As such, such changes and additions do not support a conclusion that the charges in the Superseding Indictment do not relate back to the date of the original Indictment. See Snowden, 770 F.2d at 398.

Finally, the remainder of the changes in the Superseding Indictment also are inconsequential. Paragraph 36 of the Introduction states that Sharp "was enrolled as a provider with Medicare, Medicaid and WVWC," which is an obvious deduction from the

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[10] Paragraph 26 in the Superseding Indictment deleted a sentence explaining the requirements for using CPT code 99211, and replaced it with a sentence noting that "CPT codes 99212 through 99215 were reserved for office visit services rendered by a licensed physician, nurse practitioner or physician assistant."

explicit charges in the original Indictment. The first paragraph of each section altered the reference to the Introduction as being one paragraph longer. Paragraph 7 of Counts 1-10 added the phrase "on that date of service," and paragraph 4 of Counts 11-20 merely removed the phrase "and caused claims to be submitted" while adding the phrase "and caused such claims to be submitted" at the end of the paragraph. Again, these changes in no way alter or broaden the charges or the facts contained in the original Indictment.

Thus, there is no basis to conclude that the Superseding Indictment broadened the charges in the original Indictment such that the charges in the Superseding Indictment are barred from relating back to the date of the original Indictment. See Snowden, 770 F.2d at 398. Moreover, the Court agrees with the government that, because Sharp did not raise the affirmative defense of the statute of limitations at trial, he has waived that defense. See United States v. Matzkin, 14 F.3d 1014, 1017-18 (4th Cir. 1994)(holding that the statute of limitations in 18 U.S.C. § 3282 is an affirmative defense that may be waived).

C. Prosecutorial Misconduct

Sharp alleges that the government engaged in prosecutorial misconduct by (1) entering into an agreement with his trial counsel that prevented him from testifying, (2) knowingly presenting false testimony at trial, (3) making misleading statements during closing argument, and (4) preventing witnesses from being interviewed by Sharp's attorneys, both before and after trial.

First, as the Court found at the evidentiary hearing on July 2, 2009, there was no agreement between Sharp's trial counsel and the government to deprive Sharp of the right to testify. During that hearing, in support of his allegations, Sharp relied on an affidavit from Lois Workman, a witness at trial, who asserted that, prior to trial, the government had told her that, during her testimony, she should only provide "yes" or "no" answers. In her affidavit, Workman also asserted that some of her trial testimony was "misleading and inaccurate."

A review of Workman's trial testimony, however, establishes that she did not answer only "yes" or "no" to questions asked of her, but provided detailed answers throughout her testimony. Moreover, as the government argued on July 2, 2009, the portions of Workman's testimony characterized in her affidavit as "not accurate" were not material to the charges against Sharp. Accordingly, the evidence adduced at trial and otherwise found in the record does not support Sharp's allegation that the government presented false testimony during his trial.

Second, Sharp argues that the Court erred in overruling his objections to some of the government's remarks in its closing argument. He also contends that it improperly refused either to strike those remarks or to grant him a surrebuttal argument because the government had raised issues in its rebuttal argument that were neither the subject of Sharp's closing nor based on evidence presented during the trial. In this regard, Sharp specifically objects to the government's reference to "altered records."

The government denies that its rebuttal argument was improper. And, if its argument was improper, the government contends no reversible error occurred.

In order for a defendant to make out a claim of prosecutorial misconduct that amounts to reversible error, "'(1) the prosecutor's remarks or conduct must in fact have been improper, and (2) such remarks or conduct must have prejudicially affected the defendant's substantial rights so as to deprive the defendant of a fair trial.'" United States v. Brockington, 849 F.2d 872, 875 (4th Cir. 1988)(citations omitted), overruled on other grounds by Bailey v. United States, 516 U.S. 137 (1995).

After reviewing the record in this case, the Court concludes that the government's remarks during closing arguments were not improper.[11]

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[11] The government made the following argument during its rebuttal:

Mr. Bernard:	He [Sharp's counsel] also said [during his closing argument that the defendant didn't hide records but in this case the defendant had sole and exclusive custody of the records and when he did send the records into Workers Comp, what happened?"
Mr. Hirschhorn:	Objection, Judge. May we approach?
The Court:	No, I'm going to let him finish. Sit down.
Mr. Bernard:	What happened to those records? They were altered and that isn't a broken pipe. That isn't maybe it rained

Importantly, the complained-of reference to altered records by the government came in response to the closing argument of Sharp's attorney referencing a memo by John Mitchell, Sharp's office manager. That memo, which was in evidence, discussed changing incorrect information on account collection forms, and contained the statement, "Change it or bring it to someone's attention." In his closing argument, Sharp's attorney had argued that the memo did not say to bring wrong information to Sharp's attention, but only that it should be brought to someone's attention. In addition, he had argued that fraudulent claims arose due to John Mitchell's advice or innocent mistakes, and that Sharp's honest and law-abiding nature demonstrated that he had not knowingly hidden anything.

Even if the government's statements in response to this argument could be considered improper, they did not unfairly prejudice Sharp's substantive rights; nor do they amount to reversible error. United States v. Ollivierre, 378 F.3d 412 (4th Cir. 2004). "Several factors are relevant to the determination of possible prejudice to the defendant: "(1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of

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outside. A human altered those records before they were sent. A human did that and who had the motivation? Who stood to lose or gain by those audits? The defendant.

See Trial Trans. P. 2678-79 (dkt. no. 166).

the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters." United States v. Chorman, 910 F.2d 102, 113 (4th Cir. 1990).

As the government points out, the trial of this case lasted through three weeks of testimony and evidence. In addition to a number of witnesses, numerous records were admitted for the jury's consideration. In total, it cannot be said that the few lines uttered by government counsel in his rebuttal argument, which responded to Sharp's attorney's argument both during trial and in his closing, and which, as the Court noted during trial, went directly to Sharp's state of mind, were not so prejudicial as to affect his substantive rights and deprive him of his right to a fair trial. For those reasons, the defendant's contention that the government's rebuttal argument was improper and amounted to reversible error is unavailing and cannot support Sharp's motions for a judgment of acquittal or for a new trial.

D. 18 U.S.C. § 1347 and State-Run Workers' Compensation Programs

Sharp next asserts that 18 U.S.C. § 1347 does not apply to worker's compensation programs that are wholly owned and operated by states, because (1) the statute does not specifically state that it applies to such programs, (2) the legislative history of the statute, although mentioning health insurance programs, does not specifically mention state-run worker's compensation programs, and (3) Congress could have explicitly stated that the statute applied to such programs, but did not do so. Sharp cites no

case law nor any portion of the relevant legislative history in support of his argument. Instead, he "presumes" that Congress was "concerned" about the implications of the Tenth Amendment and "knew" that states would have their own statutes to address worker's compensation fraud. This argument is wholly without merit.[12]

As the government's response points out, state workers' compensation programs clearly fall under the express provisions of 18 U.S.C. § 1347. "Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice - (1) to defraud any healthcare benefit program . . . shall be fined under this title or imprisoned not more than 10 years, or both." 18 U.S.C. § 1347 (emphasis added). "Healthcare benefit program" is defined as

> **[A]ny** public or private plan or contract, affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item, or service for which payment may be made under the plan or contract.

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[12] At the end of his argument, Sharp summarily asserts that the admission of evidence during trial related to his civil dispute with West Virginia Workers' Compensation, the ultimate resolution of which was irrelevant and unduly prejudicial. To the extent Sharp raises this issue as a ground for his posttrial motion, the Court finds that such evidence, to the limited extent it arose during the trial, was relevant to the claims in this case and that its probative value was not substantially outweighed by any unfair prejudice. See Fed. R. Evid. 401, 402 and 403. Accordingly, the Court rejects this basis for Sharp's motion, as well.

18 U.S.C. § 24(b) (emphasis added).

The WVWC is a public plan or contract under which medical benefits, items and services are provided to individuals. Moreover, as the government established at trial through the testimony of Jeannie Cress, WVWC affects commerce. See Trial Trans. P. 530 (dkt. no. 156). Accordingly, this Court concludes that 18 U.S.C. § 1347 is applicable to the charges of fraud against the WVWC program and denies Sharp's motion on this ground.

E. Admission of Statistical Evidence

Sharp argues that the Court erred in denying his pretrial motion to exclude evidence at trial presented by Dr. Klaus Miescke, a statistician, because (1) statistical evidence is never appropriate for trial, but only for sentencing, and (2) Dr. Miescke's extrapolation evidence was unduly prejudicial, irrelevant, misleading and confusing to the jury. Specifically, Sharp argues that extrapolation evidence created the impression that his medical practice was "riddled" with fraud, when only a small portion of his practice was ever reviewed for fraudulent activity. Sharp also argues that the inclusion of statistical evidence in the Superseding Indictment was unfairly prejudicial.

The government relies on United States v. Pierce, 409 F.3d 228 (4th Cir. 2005), to support its contention that extrapolation evidence may appropriately be used at trial. In Pierce, the defendant was convicted of mail fraud and conspiracy to commit mail fraud in connection with a bingo operation. While the holding in Pierce is

distinguishable from this case in that it dealt with sentencing guideline calculations, the Fourth Circuit nevertheless upheld testimony from the case agent during trial concerning his calculations about the monthly average of defendant's purchases, and from that, his extrapolation of the total loss figure over the duration of the conspiracy. 409 F.3d at 234. The government further argues that the testimony of Dr. Miescke and the statistical evidence he presented meets the requirements of Federal Rule of Evidence 403 because the probative value of the statistical evidence outweighed any unfairly prejudicial impact.

After weighing the parties' arguments, the Court has no trouble concluding that Dr. Miescke's statistical testimony was properly admitted, see Pierce, 409 F.3d at 234, and survives the defendant's challenge under Federal Rule of Evidence 403 because its probative value substantially outweighed any unfair prejudice to the defendant.

F. Expert Testimony from a Physician in Health Care Fraud Cases

Sharp next contends that the government was required to present expert testimony from a physician in order to meet its burden of proof in this health care fraud prosecution. In support of this argument, he cites a number of cases in which the government proffered physician expert testimony, including United States v. Wexler, 522 194 (2nd Cir. 2008); United States v. Moon, 513 F.3d 527 (6th Cir. 2008); United States v. Boesen, 541 F.3d 838 (8th Cir. 2008); United States v. Smith, 296 Fed. Appx. 770 (11th Cir. 2008) (unpublished); United States v. Bek, 493 F.3d 790 (7th Cir. 2007); and United States

v. Mermelstein, 487 F. Supp. 2d 242 (E.D.N.Y. 2007). Each of these cases, however, merely reflects a strategic decision by the government to rely on the testimony of physicians as part of its case-in-chief. Sharp offers no authority supporting his argument that non-physician experts "are not qualified to render opinions on medical decision-making contained in the various CPT manuals and CPT guidelines."

As it did prior to trial, the government argues again that its case against Sharp was about fraudulent coding and billing, not medical necessity or medical decision-making. Thus, it proffered the expert opinion of Dr. Betty Stump, a certified professional coder[13] qualified to evaluate the CPT Manual requirements and the justification for a particular code.

The government points out that, during her trial testimony, Stump discussed why an evaluation of the medical decision making component in coding is not clinical: "I don't question what the medical plan was; I simply evaluate it to determine where it falls in the scope of severity for assigning a code." As such, her evaluation was an objective one that, based on Sharp's clinical notes, determined whether the medical decision-making component was coded and

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[13] To the extent that Sharp's argument includes a challenge to the testimony of Dr. Betty Stump, an expert witness for the government who testified that the 1995 Guidelines were more advantageous to Sharp, the Court stated its reasons on the record at the final pretrial conference when it denied Sharp's motion in limine in this regard. Again, it finds that Dr. Stump was qualified to offer such opinions and, therefore, denies his motion for a judgment of acquittal or a new trial on this ground.

billed appropriately. It was not an exercise of clinical judgment.

The issues in this case did not involve questions of medical necessity, but rather alleged that Dr. Sharp had submitted claims for payment for services he had never rendered, or had sought reimbursement for higher levels of service than he had actually provided. In similar health care fraud cases, coding experts have routinely testified about whether services a provider billed were appropriate. See eg., United States v. Janati, 374 F.3d 263 (4th Cir. 2004) (ruling on an interloctury appeal). Furthermore, as the government points out, all the cases Sharp cites to support his argument that the government must present physician expert testimony involved disputed questions of "medical necessity". By their nature, these are clinical cases which, unlike the instant case, do require the testimony of an expert health care provider.

Because this case did not raise issues of medical necessity or any other clinical issue requiring a physician's testimony, and because the use of a coding expert was appropriate, see Janati, 374 F.3d at 267, the Court rejects Sharp's contention that the government was required to provide expert physician testimony to prove health care fraud under 18 U.S.C. 1347.

G. Sufficiency of the Evidence

Sharp contends that the jury's verdicts of guilty as to all the counts of the Superseding Indictment were based on insufficient evidence, and that the evidence produced at trial weighs so heavily against the verdicts that it was unjust to enter

judgment against him. Specifically, he asserts that, although the charges against him alleged he had incorrectly used the extended office visit code 99354 to bill for services not rendered (counts 1-10), that he had upcoded or given instruction to upcode (Counts 11-20), and that he had billed for patient office visit services not rendered (Counts 21-30), no witness testified he had committed any such acts. In fact, Sharp contends that the government's case rested on "what it claims as lack of documentation," which alone is insufficient to convict under 18 U.S.C. § 1347. To support this argument, Sharp recounts evidence and testimony presented at trial, and relies on the proffer from an attorney, James Fox, whose testimony the Court excluded. He argues that this evidence establishes his innocence, and that, at trial, his expert, Dr. Sophocles, refuted the government's coding expert, Dr. Betty Stump.

A defendant who challenges a jury verdict based on the sufficiency of the evidence bears a heavy burden. See Jackson v. Virginia, 443 U.S. 307, 319 (1979). "If there is substantial evidence to support the verdict, after viewing all of the evidence and the inferences therefrom in the light most favorable to the Government, then we must affirm." U.S. v. Murphy, 35 F.3d 143, 148 (4th Cir. 1994) (citing Glasser v. U.S., 315 U.S. 60, 80 (1942)). Substantial evidence exists whenever a reasonable finder of fact could accept the evidence admitted as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt. U.S. v. Burgos, 94 F.3d 849, 862 (4th Cir. 1996), cert. denied, 519 U.S. 1151 (1997).

Here, substantial evidence supported the jury's verdict. At trial, the Government submitted voluminous documents, as well as testimony regarding each element of each count of conviction. Both parties presented expert testimony that disputed the other side's methods and opinions. In addition, through careful cross- examination and vigorous closing argument, Sharp's trial counsel attacked the credibility of the government's witnesses, including Stump, the government's coding expert. After receiving all the evidence and hearing the arguments of the attorneys, the jury determined what weight, if any, to give to the evidence. After doing so, it convicted Sharp on all counts charged. Based on its own review of the record in this case, the Court finds that the government introduced substantial evidence at trial to support the jury's verdicts of guilt beyond a reasonable doubt, and denies Sharp's motion for a new trial on this ground. Moreover, even though Sharp alleges that his expert testimony wholly discredited the government's expert, the Court finds that the jury's verdict is not against the weight of the evidence. See Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 433 (1996) ("[A district judge has] discretion to grant a new trial if the verdict appears to [the judge] to be against the weight of the evidence.") (quoting Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 540 (1958)).

H. Jury Instruction on Defendant's Theory of the Case

Sharp next attacks the jury charge. He asserts the Court erred by refusing to include as part of its instructions to the jury a statement he offered on his

theory of the case for "Confusing and Ambiguous CPT Guidelines" (dkt. no. 126). As he argued when he submitted his revised instruction (dkt. no. 128) at the end of the case, Sharp now asserts that "at least upon proper request, a defendant is entitled to an instruction submitting to the jury any theory of defense for which there is a foundation in the evidence." United States v. Hicks, 748 F.2d 854, 857 (4th Cir. 1984). Sharp also posits that his theory of the case instruction should have been given because it was modeled on one approved in United States v. Migliaccio, 34 F.3d 1517 (10th Cir. 1994).

The instruction that Sharp contends the Court should have included in its charge, "Confusing and Ambiguous CPT Guidelines," stated in its entirety:

> There has been testimony that the CPT guidelines are confusing and ambiguous. Witnesses have testified that both clinicians and certified coders disagree as to the correct interpretation or application of the CPT codes at issue. The Defendant contends that because the CPT Guidelines governing coding and billing are ambiguous and confusing, his interpretation of the guidelines was reasonable. A reasonable doubt may arise when witnesses disagree on the proper interpretation and application of the CPT coding and billing guidelines because "[i]t is not the purpose of the law to penalize frank differences of opinion for innocent errors made despite the exercise of reasonable care."

> You may find ambiguities exist in the CPT guidelines as to the requirements for the coding and billing at issue here. If you find that such ambiguities exist, then to prove that the Defendant knew his billing practices were unlawful, the Government must prove beyond a reasonable doubt that there is no reasonable interpretation of the coding for the medical services rendered which would make the CPT codes the Defendant submitted factually correct.

Dkt. No. 126, p. 6 (citations omitted).

The government argues that this proposed instruction was better suited for closing argument, and was, therefore, not appropriate for inclusion in the charge. See United States v. Fowler, 932 F.2d 306, 316 (4th Cir. 1991). Although it concedes that the Court was required to the jury on the law pertaining to the defendant's theory of the case, the government asserts that the Fourth Circuit does not require the trial court to summarize the defendant's evidence in its instructions. Moreover, whenever the law on which the defendant relies is adequately explained in a proper burden of proof instruction in the charge, it is not error for the court to reject an argumentative theory of the case instruction. Id. The government further contends that the Migliaccio case is not analogous to Sharp's case, and Sharp's alleged confusion about coding was not a valid basis for a legal defense. See United States v. Janati, 237 Fed. Appx. 843 (4th Cir. 2007)(unpublished).

At the final charge conference conducted on June 9, 2008, following an extensive discussion the Court ruled that the defendant's instruction was argumentative and also attempted to define reasonable doubt for the jury in terms deemed improper under Fourth Circuit precedent. See United States v. Najjar, 300 F.3d 466, 486 (4th Cir. 2002) (affirming that it is improper to define reasonable doubt unless the jury so requests). Accordingly, because the defendant's proposed instruction was improper and the Court's own instruction on good faith properly stated the law on which Sharp rested his defense, covering the issues of honest mistake and error of judgment in management, the Court declined to include Sharp's proposed theory of the case instruction in its charge. Fowler, 932 F.2d at 316.

The government is correct that Sharp's reliance on Migliaccio is misplaced. In that case, the defendant was charged with defrauding CHAMPUS, a government health care benefit program that requires the defendant to report all procedures performed, whether they were covered or not. 34 F.3d at 1523. In this case, no such requirement applied.

Moreover, while Sharp's theory of defense, premised on alleged confusion, might raise a factual defense to a health care fraud charge, it is not a legal defense. United States v. Janati, 237 Fed Appx. 843 at 846-47. Pursuant to the holding in Janati, this Court determined that argument about Sharp's confusion attempted to elevate a factual issue dealing with his state of mind to a legal argument for which there was no support. 18 U.S.C. § 1347 is

not overly vague, and Sharp's contention that the CPT codes and guidelines were ambiguous and confusing is not supported by the record. He therefore was not entitled to the theory of the case instruction he submitted.

I. Trial Rulings

Sharp next contends that the Court erred in a number of its evidentiary rulings during the trial.

1. "Search Warrant"

First, Sharp argues that allowing the government to elicit testimony about a "search warrant" the government obtained indicated to the jury that he had done something wrong. Moreover, he contends that the reference to a "search warrant" had minimal probative value but its overwhelming prejudice "affected" his conviction, despite the Court's curative instruction.

In response, the government notes that its purpose was not to offer evidence about how a search warrant is applied for or approved, but rather to put into proper context how the investigating officer obtained the records from Sharp's office. The government argues that giving the jury knowledge that some records were recovered pursuant to a search warrant was necessary to set up the contrast between records seized pursuant to the search warrant and those voluntarily produced by Sharp. That contrast was relevant and not unduly prejudicial because, as the United States contended throughout the trial, the documents produced by Sharp had been altered. Finally, Sharp's contention that the mere mention of a "search warrant" implied

to the jury that he had "done something wrong" and created error is unavailing. As the government recognizes, upholding such an argument would make all criminal prosecutions involving an "indictment" and "investigation" impossible to prosecute.

Sharp's bald allegation that the mere mention of a "search warrant" created error in his case therefore is baseless. The government limited its inquiry on the issue, focusing on providing the jury with a complete story of the case's investigation, so as to put in proper context the production of certain documents obtained from the search and those produced by Sharp. See United States v. Kennedy, 32 F.3d 876, 885 (4th Cir. 1994). Accordingly, Sharp's motion on this ground is without merit.

2. Limitation of Defense Witness Testimony and Exclusion of State of Mind Evidence

Sharp also argues that the Court erred when it denied the admission of the testimony of James Fox, an attorney, and refused to admit Defense Exhibits 43-1a through 43-5a, 52 and 53. Sharp contends that this evidence, which related to an audit and lawsuit involving the WVWC, went to his state ' mind and established his good faith belief that he could "exchange" certain billing codes for CPT codes 99354 from 2000 through 2005, thereby helping to prove his lack of the requisite criminal intent to defraud Medicare, Medicaid and WVWCC. Importantly, Sharp emphasizes that this evidence was relevant because it would have allowed the jury to infer his requisite state of mind from his conduct.

United States v. Van Metre, 150 F.3d 339 (4th Cir. 1998).

In and of itself, this evidence could not have given rise to a reasonable inference as to Sharp's state of mind, because the exhibits Sharp identifies dealt with a prior WVWC audit and had no connection to the issues in this case. As the Court recognized on the record during an earlier hearing on this matter, Sharp had to connect those unrelated documents to the charges in his criminal case before the jury could properly infer from them his state of mind. Although Sharp wanted to use Fox's testimony to create that link, Fox could not properly have testified about what Sharp thought about the audit documents or Sharp's "beliefs" in regard to "exchanging" billing codes. See Fed. R. Evid. 801, 802, and 803.

Moreover, Sharp's reliance on Van Metre is misplaced. Although that case does support the principle that a defendant's state of mind can be inferred from his conduct, its holding dealt with the admissibility of evidence under Federal Rule of Evidence 404(b), regarding a defendant's prior acts. Here, Sharp attempted to admit evidence of a prior audit by a state agency.

For all of these reasons, as well as the reasons stated on the record during the trial, the Court did not err in its ruling when it excluded Fox's testimony.

3. Exclusion and Limitation of Defense Witnesses' Testimony

Finally, Sharp alleges that the Court erred in excluding testimony from his expert, Dr. Sophocles, regarding certain health care benefit programs that, on or after January 1, 2008, allowed reimbursement for some telephone contact codes based on the CPT Manual codes. Sharp contends that, although he was permitted to cross-examine Ms. Clendenen on this issue, the Court excluded all subsequent inquiry on this issue of other witnesses which would have been relevant to establish (1) that the drafters of the CPT codes acknowledged the need for specific codes addressing the billing of telephone calls, and (2) that there was inherent confusion in the old codes based on the simple fact that new codes were required to address the issue.

As the government points out, however, the crimes charged against Sharp predated January 1, 2008, and none charged in the Superseding Indictment alleged fraud with respect to telephone codes found in the CPT Manual. Thus, the provisions in the January 1, 2008 CPT Manual were not relevant to the issues in dispute in Sharp's case. Moreover, Dr. Sophocles ultimately admitted that conduct such as Sharp's intentional billing of telephone calls as office visits, because he knew or suspected that the insurer would not pay for a phone call, would have been fraudulent in any event.

Given that all the charges against Sharp related to events prior to the effective date of the January 1, 2008 change in the codes, the testimony Sharp sought to elicit from Dr. Sophocles regarding

the January 1, 2008 codes was irrelevant. The Court therefore rejects any argument that it improperly excluded such testimony under Federal Rules of Evidence 401 and 402.

IV. Conclusion

For the reasons stated on the record during Sharp's trial, and at his subsequent evidentiary hearing, and as discussed in this Order, when viewed in a light most favorable to the government under Fed.R.Crim.P. 29(c), the totality of the evidence establishes that a reasonable mind would fairly conclude that Sharp is guilty of the charged offenses beyond a reasonable doubt. See Gallagher, 856 F. Supp. at 297. Moreover, pursuant to Fed.R.Crim.P 33, more than sufficient evidence was adduced at trial to support the jury's verdicts of guilty against Sharp on all of the counts in the Superseding Indictment and precludes a finding that it would be unjust to enter judgment. See Arrington, 757 F.2d at 1485. Accordingly, the Court **DENIES** Sharp's motion to set aside the jury's verdicts and enter a judgment of acquittal and **DENIES** his motion for a new trial (dkt. no. 172). Furthermore, the Court **DENIES AS MOOT** the pending motions in limine (dkt nos. 55, 62, 65, 66, 77) and the government's motion for a protective order (dkt. no. 186).

It is so **ORDERED.**

The Clerk is directed to transmit copies of this Order to counsel of record and all appropriate agencies.